

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TIMOTHY H. JOHNSON,

Plaintiff,

v.

DANA MARKS, et al.,

Defendants.

Case No. 3:23-cv-00361-ART-CSD

ORDER

Plaintiff Timothy Johnson brings this action under 42 U.S.C. § 1983 for events occurring while Plaintiff was housed at Lovelock Correctional Center. Johnson's claim asserts that he continues to be denied necessary medical care. Before the Court is Plaintiff's motion for a preliminary injunction and temporary restraining order. (ECF Nos. 14, 15.)¹ Defendants filed responsive briefs (ECF Nos. 33, 34, 35-1 to 35-8) and Plaintiff filed a reply. (ECF No. 38.)

United States Magistrate Judge Craig S. Denney has issued a Report and Recommendation ("R&R") (ECF No. 48) recommending denial of Plaintiff's motions as moot. Plaintiff filed an objection to that R&R. (ECF No. 50.) Defendants filed a response (ECF No. 53), to which Plaintiff filed a reply (ECF No. 60.) For the reasons identified below, the Court overrules Plaintiff's objection, affirms the R&R, and denies Plaintiff's motions for a preliminary injunction and temporary restraining order (ECF Nos. 14, 15.) However, in light of the fact that Plaintiff indicated in his objection and reply to the R&R that he was not receiving necessary follow-up care (ECF Nos. 50, 60) the Court will order Defendants to file

¹ These documents are identical but docketed separately due to the differing relief sought.

1 a status report regarding Mr. Johnson's follow-up care.

2 **I. Factual and Procedural Background**

3 Upon review, the Court agrees with and adopts the magistrate judge's
4 factual and procedural history (ECF No. 48 at 1-3) in full:

5 Plaintiff is an inmate in the custody of the Nevada Department of
6 Corrections (NDOC), proceeding *pro se* with this action pursuant to 42 U.S.C. §
7 1983. (Second Amended Complaint (SAC), ECF No. 13.) The events giving rise to
8 this action took place while Plaintiff was housed at Lovelock Correctional Center
9 (LCC).

10 The Court screened Plaintiff's SAC and allowed him to proceed with two
11 Eighth Amendment deliberate indifference to serious medical needs claims. The
12 first claim is for deliberate indifference to the need to monitor and treat his
13 abdominal aortic aneurysm, and is proceeding against John or Jane Doe medical
14 staff who were responsible for securing the abdominal ultrasound results. The
15 second claim is against Dr. Marks, and John and Jane Doe Utilization Review
16 Panel (URP) members when Plaintiff learns their identities. This claim is based
17 on alleged deliberate indifference to the need to diagnose and treat his bladder
18 cancer. He alleges that Dr. Marks delayed referring Plaintiff to the URP to see an
19 oncologist (or other specialist) after cancer was detected in his urine, and the URP
20 delayed approving the request to see an outside provider despite the fact that his
21 symptoms had been going on for months. (ECF No. 20.)

22 Plaintiff filed a motion for injunctive relief seeking an order that NDOC take
23 him to see a urologist or oncologist for his cancer, and to a vascular surgeon for
24 his abdominal aortic aneurysm.

25 The Court held a hearing on January 3, 2024, where Senior Deputy
26 Attorney General Rands represented that the recommended surgery had been
27 authorized and was in the process of being scheduled. (ECF No. 39.) On January
28 4, 2024, Mr. Rands filed a notice indicating that the surgery had in fact been

1 scheduled, and the dates were filed under seal for safety and security reasons.
2 (ECF Nos. 40, 41.)

3 On February 7, 2024, the Court ordered Mr. Rands to file a status update.
4 (ECF No. 45.)

5 On February 14, 2024, Mr. Rands filed a status update indicating Plaintiff
6 had two surgical procedures for his bladder: a transurethral resection of bladder
7 tumor (TURBT) on January 29, 2024, and a partial cystectomy with bladder
8 diverticulectomy and right pelvic lymph node dissection on February 2, 2024.
9 Plaintiff saw Dr. Nixon for a follow up appointment on February 7, 2024, and it
10 was recommended that he see Dr. Beal, a vascular surgeon, to discuss his
11 aneurysm. Plaintiff has another follow up scheduled with Dr. Nixon, and he has
12 been scheduled to see a vascular surgeon to evaluate his aneurysm. The dates of
13 these appointments have been filed under seal for safety and security reasons.
14 (ECF Nos. 47, 47-1.)

15 Additionally, after Judge Denney's R&R was issued, Defendants filed a
16 status update on March 12, 2024 (ECF No. 57.) In this filing, Defendants
17 indicated that Plaintiff had completed his appointment with a vascular surgeon,
18 with supporting records from this appointment filed under seal. (*Id.* at 1; ECF
19 No. 55-1.)

20 **II. Legal Standard**

21 **A. Preliminary Injunction and Temporary Restraining Order**

22 A party seeking a preliminary injunction must demonstrate (1) a likelihood
23 of success on the merits, (2) a likelihood of irreparable harm if preliminary relief
24 is not granted, (3) the balance of equities is in their favor, and (4) an injunction
25 is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555
26 U.S. 7, 20 (2008). The analysis for a temporary restraining order is "substantially
27 identical" to that of a preliminary injunction. *Stuhlbarg Intern. Sales Co, Inc. v.*
28 *John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001).

1 A case is moot when it has “lost its character as a present, live controversy
2 of the kind that must exist if [the court is] to avoid advisory opinions on abstract
3 propositions of law.” *Oregon v. FERC*, 636 F.3d 1203, 1206 (9th Cir.2011) (per
4 curiam). A motion for a preliminary injunction can therefore be moot where the
5 relief requested has been obtained. *See DeFunis v. Odegaard*, 416 U.S. 312 (1974)
6 (holding that case was moot where plaintiff was afforded the remedy requested).

7 **B. Review of Reports and Recommendations**

8 Under the Federal Magistrates Act, a court “may accept, reject, or modify,
9 in whole or in part, the findings or recommendations made by [a] magistrate
10 judge.” 28 U.S.C. § 636(b)(1). Where a party timely objects to a magistrate judge's
11 report and recommendation, then the court is required to “make a *de*
12 *novo* determination of those portions of the [report and recommendation] to which
13 objection is made.” 28 U.S.C. § 636(b)(1). A court is not required to conduct “any
14 review at all . . . of any issue that is not the subject of an objection.” *Thomas v.*
15 *Arn*, 474 U.S. 140, 149 (1985).

16 **III. Analysis**

17 Plaintiff objects to Magistrate Judge Denney’s R&R on the basis that his
18 motion for a preliminary injunction and temporary restraining order are not moot,
19 as there is no guarantee that NDOC will follow through with the appointments
20 which are scheduled. (ECF Nos. 50 at 2; 60 at 3, 6.) Accordingly, the Court
21 reviews this issue *de novo*.

22 Plaintiff’s motion for a preliminary injunction and temporary restraining
23 order requests an order that NDOC “arrange for plaintiff to be diagnosed and
24 staged for the cancer, and to see a vascular surgeon for monitoring or surgery for
25 the abdominal aortic aneurysm.” (ECF No. 14 at 26.)

26 Plaintiff does not dispute that he has since undergone medical procedures
27 to treat his cancer, and that he was scheduled to see a vascular surgeon for his
28 aneurysm. However, Plaintiff argues in his objection to Judge Denney’s R&R that

1 he is concerned about receiving the necessary follow-up care for his surgery. (ECF
2 No. 50 at 2-3.) In his reply, Plaintiff asserts that 39 days after his surgery, he had
3 yet to receive a follow up appointment to schedule BCGx6 to further treat his
4 cancer, as recommended by his surgeon. (ECF Nos. 60 at 6; 55-2 at 8.)

5 At the time of Judge Denney's R&R, it appears from the record that Plaintiff
6 was receiving and/or scheduled to receive the medical care requested, making
7 his preliminary injunction and temporary restraining order moot. (ECF Nos. 47,
8 47-1, 57, 55-1.) The Court thus agrees with Judge Denney's determination that
9 these motions are moot. However, Plaintiff subsequently indicated in his reply
10 brief that he is not receiving the necessary follow-up medical care. (ECF Nos. 60
11 at 6; 55-2 at 8.) Construing Plaintiff's motion liberally,² necessary follow-up care
12 for his cancer treatment may be encompassed in the relief sought, and may give
13 rise to a renewed motion for relief. Therefore, while the Court affirms Judge
14 Denney's R&R and denies Plaintiff's motion for a preliminary injunction and
15 temporary restraining order as moot, the Court will order Defendants to issue a
16 status report regarding Mr. Johnson's follow-up care. Based on the information
17 in the status report, the Court will issue further directions to Plaintiff. If follow-
18 up care has not been provided, the Court will take additional steps to address the
19 matter.

20 **IV. Conclusion**

21 It is therefore ordered that Plaintiff's objection to Judge Denney's Report
22 and Recommendation (ECF No. 50) is OVERRULED.

23 It is further ordered that Judge Denney's Report and Recommendation
24 recommending denial of Plaintiff's motions for a preliminary injunction and
25 temporary restraining order as moot (ECF No. 48) is AFFIRMED.

26 It is further ordered that Plaintiff's motions for a preliminary injunction

27 ² The Court construes *pro se* filings liberally. *Florer v. Congregation Pidyon*
28 *Shevuyim, N.A.*, 639 F.3d 916, 923 n. 4 (9th Cir. 2011).

1 and temporary restraining order (ECF Nos. 14, 15) are DENIED as moot.

2 It is further ordered that Defendants must submit a status report regarding
3 Mr. Johnson's follow-up care, including a follow up appointment to schedule
4 BCGx6 to further treat his cancer, by October 4, 2024.

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6 Dated this 20th day of September, 2024.

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10 ANNE R. TRAUM
11 UNITED STATES DISTRICT JUDGE
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